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January 8, 2001

VIA HAND DELIVERY

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OFFICE OF THE SECRETARY

Re: Supplemental Comments of Allegiance Telecom, Inc.

Dear Ms. Salas:

Enclosed for filing please find an original and two copies of the Supplemental Comments in CC Docket 00-217 of Allegiance Telecom, Inc. together with a "stamp copy." Please date stamp the copy and return to this firm via the courier delivering the pleading.

Thank you for your time and consideration.

Sincerely,

Emily M. Williams
Emily M. Williams

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN - 8 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Joint Application by SBC Communications, Inc.,)
Southwestern Bell Telephone Company, and) CC Docket No. 00-217
Southwestern Bell Communications Services, Inc.)
d/b/a Southwestern Bell Long Distance for)
Provision of In-Region, InterLATA Services in)
Kansas and Oklahoma)

**SUPPLEMENTAL COMMENTS OF
ALLEGIANCE TELECOM, INC.**

Allegiance Telecom, Inc. ("Allegiance"), pursuant to Public Notices DA-00-2912 and DA-00-2917, released December 27, 2000, and December 28, 2000, respectively, submits these Supplemental Comments in response to the two ex parte filings made by Southwestern Bell in the above-captioned proceeding concerning the Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance ("SBC") for Provision of In-Region, InterLATA Services in Kansas and Oklahoma filed October 26, 2000 (the "Application").

In initial comments in this proceeding several commenters, including the Department of Justice, demonstrated that SBC's recurring and nonrecurring charges for UNEs in Oklahoma and Kansas are substantially higher than those in Texas that the Commission has found to be appropriately based on TELRIC principles and that the recurring charges in Oklahoma typically are substantially higher than those in Kansas, despite virtually identical supporting information

submitted by SBC in both states.¹ These commenters argued that although a difference in charges between two states does not definitively show that one or both charges do not comply with TELRIC principles, large unexplained differences raise a substantial question as to the lawfulness of the rates, in this case the lawfulness of the Kansas and Oklahoma rates since the Commission has already found that the Texas rates are based upon TELRIC principles. Other comments raised substantial issues as the procedures used in the states, and particularly in Oklahoma, to review the SBC proposed rates.²

In response to these comments, SBC, in its Reply Brief filed December 11, 2000, argued that the Commission should be unconcerned that the rates in Oklahoma and Kansas are higher than those in Texas as TELRIC is a “methodology, not a result”³ and the Commission has previously recognized that costs may be higher in Oklahoma and Kansas than in Texas. In the *ex parte* filings that are the subject of these Supplemental Comments, SBC states that the rates that were submitted in the initial application in October comply with the TELRIC methodology, but that as a compromise and to allay the concerns of CLECs and the DOJ, SBC has agreed to a voluntary reduction of some of the non-recurring rates in Kansas and some of the recurring and nonrecurring rates in Oklahoma. Southwestern states that the price reductions will be available

¹ See, e.g., Comments of Sprint, passim (filed Nov. 15, 2000); Comments of AT&T, passim (filed Nov. 15, 2000); Comments of ConnectSouth, passim (filed Nov. 15, 2000); Evaluation of the US Department of Justice, passim (filed Dec. 4, 2000).

² See, e.g., Comments of Sprint; Evaluation of the US Department of Justice. The DOJ notes that the rates set in Oklahoma were set between the rates proposed by SBC and one CLEC. But as DOJ notes “the fact that a price is set in some mid-point range . . . does not indicate that the price is appropriately cost based, absent a separate determination that both the higher and lower proposed prices are appropriately cost based.” *Id.* at 18.

³ Reply Brief at 6.

immediately to any competing local exchange carrier that “accepts the O2A or K2A or that ‘MFNs’ into the O2A or K2A UNE Appendix and all legitimately related provisions.”⁴

The reduced prices in Kansas will be 25% less than the NRCs prescribed by the Kansas Corporation Commission in its November 3, 2000, *Order* or the rate established by the KCC in its *Order on Reconsideration*, which ever is lower, but in no event will the rate be lower than the rate in Texas. In Oklahoma reductions ordered by the state commission will be applied to additional NRCs and NRCs that have not already been ordered to be discounted will be reduced by 25%, as long as any discount is not to a level below the corresponding NRC in Texas.

While Allegiance believes that SBC has taken a step in the right direction in lowering its rates, substantial questions remain about whether the rates comply with TELRIC principles. The Commission should not simply accept these reductions without fully analyzing the issues previously raised in this proceeding.

I. THE COMMISSION SHOULD NOT CONSIDER THE NEW RATES SUBMITTED BY SBC UNLESS IT RESTARTS THE SECTION 271 CLOCK

The fact that the new rates tend to be lower than the current rates⁵ does not excuse SBC’s failure to comply with the procedural parameters set by the Commission for consideration of

⁴ Amended Ex Parte Letter from Geoffrey M. Klineberg to Magalie Roman Salas in CC Dkt No. 00-217 (filed December 28, 2000) at 2. Allegiance understands that by this statement SBC intends to allow competitive carriers with existing interconnection agreements that have different UNE prices to opt into the new prices without accepting the entire O2A or K2A. Allegiance notes that there are provisions of both of those agreements that are unacceptable to it (and Allegiance believes many other competitive carriers). If the new prices were only available to competitive carriers that agree to opt into the entire O2A or K2A the new prices would not be available to many competitive carriers.

Section 271 applications. The Commission repeatedly has stated that it expects a Section 271 application, as originally filed, to include all of the factual evidence on which the applicant would have the Commission rely in making its determination.

Although the Commission retains the right to waive its procedural rules and consider new evidence, this is not a case in which it should do so. The reason that the Commission has consistently told applicants to include all factual evidence in their initial Section 271 filing is that the statutory 90-day review process makes it necessary to have as efficient a process as possible for such applications. The Commission and commenters cannot and should not be faced with an ever changing application. The recurring and non-recurring prices of UNEs are of critical importance to a determination of whether an applicant has satisfied the requirements of Section 271. The Commission has made clear that applicants should not make substantial substantive changes once the 90 clock starts to run.⁶

SBC states that it believes that its initial rates comply with TELRIC principles and implies that therefore the new rates must also be TELRIC based. However, substantial questions were raised by commenters about the initial rates and their compliance with the TELRIC principles, even apart from rate level issues. Even if such questions had not been raised, the Commission has a statutory duty under Section 271 to determine whether rates are in accordance

⁵ Although most of the rates now proposed are lower than the current rates, some of the proposed NRCs are the same as the current rates.

⁶ See, e.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Service in Michigan, 12 FCC Rcd, 20543, 20570 (1997); *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708, 19709 (Dec. 6, 1996).

with the law. Therefore, Commission must determine whether the rates adopted in Kansas and Oklahoma (and now the new rates proposed by SBC) comply with TELRIC principles and 27 days is insufficient to do that.

The Commission has stated that in the event that an applicant submits factual evidence that changes its application in a material respect, the Commission reserves the right to deem such submission a new application and start the 90-day review process anew. It is difficult to envision a more material change to the application than the resubmission of UNE recurring and non-recurring rates. Therefore, it is imperative that the Commission “restart the clock” on this Section 271 application. Otherwise future applicants will submit applications, wait to see what are the most substantial objections raised, and simply amend the applications at that time. That would assure procedural havoc for the Commission and commenters as they attempt to analyze a moving target.

II. SBC’s *EX PARTE* FILING DOES NOT DEMONSTRATE THAT ITS UNE RATES IN OKLAHOMA AND KANSAS COMPLY WITH TELRIC

SBC’s *ex parte* filings do not include any new evidence or arguments as to why the initial or proposed rates comply with TELRIC principles. The *ex parte* letters simply state that the initial rates were in accord with TELRIC methodology and make no specific statement about the discounted rates. Apparently, SBC believes that if the initial rates were based upon TELRIC methodology, a position with which Allegiance does not agree, any lower rates must also be based upon TELRIC methodology. SBC introduces no new evidence to show that in fact the rates do comply with that methodology. It is axiomatic that if the initial rates do not comply with

TELRIC principles, a percentage reduction in those rates does nothing to ensure that the rates comply with those principles. As SBC itself asserts, "TELRIC is a "methodology not a result."⁷

In addition to the substantial questions raised about whether the Oklahoma rates were even determined by the state to be set in accordance with TELRIC principles because there was no determination that the cost studies upon which the ALJ relied were themselves TELRIC compliant,⁸ the DOJ evaluation raised specific concerns about the low fill factors, the proper calculation of joint and common costs, improper switch prices and the assumption of manual processing in the calculation of costs. The new rates contained in the *ex partes* filed by SBC do not address any of these concerns.

While a comparison of Texas to Kansas and Oklahoma rates does not necessarily determine whether the proposed rates are TELRIC-based, it is worth noting that many of the new rates continue to be substantially above the rates the Commission recently found to be TELRIC compliant in Texas.⁹ In the case before the Commission, even after application of the

⁷ See note 3, *supra*. SBC, of course, has asserted that the initial rates complied with TELRIC methodology. In other proceedings, SBC has argued that TELRIC itself results in an unlawful taking. See Brief submitted in *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir. July 18, 2000). It is surprising that if its initial rates were in accordance with TELRIC principles, SBC would lower those rates substantially in this proceeding.

⁸ See note 2 *supra*.

⁹ There are dozens of examples that could be given but Allegiance notes only two here. The initial NRC rate for a 4 wire analog loop in Kansas was \$95.00. The proposed discounted rate is \$47.60, but the rate in Texas is \$15.03. In Oklahoma, the current NRC for 2 wire digital loops is \$60.61 and apparently SBC is proposing no reduction for that NRC as it indicates that the discounted NRC for a 2 wire digital loop will be \$60.61. In Texas the rate is \$15.03. There is simply nothing in the record that would support such a large difference in the NRC rates. As Sprint noted in its Comments:

[B]ecause NRC charges are the same for SWBT's rural zone . . . as for its urban zone . . . in both Kansas and Oklahoma, it does not appear that the usual reasons identified for disparities, such as terrain or population density, would account for the magnitude of

“discount” some of the rates in Oklahoma and Kansas are as much as 300-400 percent above the rates in Texas.¹⁰ Accordingly, to the extent that a comparison of Texas rates to Oklahoma and Kansas rates has any relevance to a determination of compliance with TELRIC, SBC has not shown that its discounted rates are TELRIC-based because they do not approximate Texas rates. In fact, as noted, Oklahoma and Kansas rates remain substantially higher.

III. CONCLUSION

While Allegiance believes that SBC’s reductions in its rates are a step in the right direction, there is simply nothing in the submission of these new rates upon which the Commission could conclude that SBC has complied with the requirements of Section 271, or specifically that the Kansas and Oklahoma rates comply with TELRIC principles. The *ex parte* submission is a simple reduction in rates and does not provide any additional evidence or information that would show that the rates comply with TELRIC principles. Unless SBC purposely set its initial Oklahoma and Kansas rates at a level above TELRIC equal to the amount of the discounts now being offered, any similarity between the new rates and TELRIC rates would be purely coincidental.

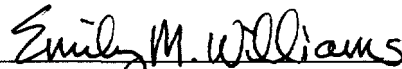
difference in the rates. Nor does labor appear to be the determinative factor [as] Texas rates . . . exceed Kansas [and Oklahoma’s rates are only 8-15% higher than Texas].

Sprint Comments at 30-31 (filed November 15, 2000).

¹⁰ The Reply brief for SBC argued that the nonrecurring loop rates in Texas do not include installation and maintenance activities that “were intended” to be recovered via the Central Office Access Charge (“COAC”) and the Trip charge. However, according to the Reply Affidavit of Thomas Ries and Barbara Smith the Texas Commission refused to allow recovery of the COAC and Trip Charge. Thus, the fact that those charges were intended to be recovered in Texas is irrelevant to the issue of whether the Kansas and Oklahoma rates comply with TELRIC. In any event, even if those charges had been allowed, it does not appear that the COAC or Trip charge would be assessed for each loop ordered. Because a CLEC typically orders a number of loops at a time, any such charge would have been spread over a number of loops. In addition, the O2A contains a separate charge for a

The initial application should be denied. If SBC wants to continue prosecution of its Section 271 application for Kansas and Oklahoma, the Commission must restart the clock on the application.

Respectfully submitted,



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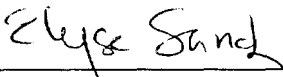
Attorneys for Allegiance Telecom, Inc.

Dated: January 8, 2001

COAC, which raises the question of whether there is double recovery for these items. In sum, SBC's explanation does not justify the large differences in the NRCs reflected in the T2A, the K2A and the O2A.

CERTIFICATE OF SERVICE

I, Elyse Sanchez, hereby certify that the foregoing Supplemental Comments of Allegiance Telecom, Inc. were filed this 8th day of January, 2001 and copies of same were sent via hand delivery and/or first class mail upon the following persons on the attached list.



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